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80 No. 1854

In The

Supreme Court of the United States

October Term, 1980

CECIL A. BENJAMIN,

Petitioner,

vs.

FRANK J. MACCHIAROLA, Individually and as Chancellor of the Board of Education of the City of New York and the BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Were the activities of the petitioner, a probationary school principal, in relation to the termination of two teachers protected by the First and Fourteenth Amendments?

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No.

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CECIL A. BENJAMIN,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Cecil A. Benjamin respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered February 18, 1981, affirming the determination of the United States District Court for the Southern District of New York that the respondents' denial of tenure to the petitioner for his activity in terminating two teachers for cause did not abridge his First and Fourteenth Amendment rights.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is an unpublished, unreported *per curiam* opinion entered on February 18, 1981. A copy of the opinion is included as Appendix A, *infra.* The opinion of the United States District Court for the Southern District of New York is dated October 17, 1980. A copy of the opinion is included as Appendix B, *infra.* The opinion was not reported.

JURISDICTION

The order of the United States Court of Appeals for the Second Circuit sought to be reviewed is dated and entered February 18, 1981. This Court's jurisdiction to review such order by writ of certiorari is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 1:

> "Congress shall make no law . . . abridging the freedom of speech . . . ."

United States Constitution, Amendment 14:

"Section 1

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983 states:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Section 2573(1)(b) of the New York Education Law stated:

> "Administrators, directors, supervisors, principals and all other members of the supervising staff, except executive directors, associate, assistant, district and community superintendents and examiners, authorized by section twenty-five hundred fifty-four of this article, shall be appointed by the board of education, upon the recommendation of the superintendent or chancellor of schools, for a probationary period of three years. The service of a person appointed to any of such positions may be discontinued at any time during the probationary period on the recommendation of the superintendent of schools, by a majority vote of the board of education."

Section 210(2f) of the New York Civil Service Law states:

> "Probation. Notwithstanding any inconsistent provision of law, any public employee who has been determined to have violated this subdivision shall be on probation for a term of one year following such determination during which period he shall serve without tenure; provided, however, that the effect of probation hereunder with regard to teachers and others subject to the education law shall not exceed or differ from the effect of probation hereunder with regard to other public employees."

Section 5.3.4C of the Bylaws of the Board of Education of the City of New York states:

> "*Review Committee in Recommendation for Discontinuance of Service.*
>
> Any person in the employ of the board of education who is summoned to appear before the chancellor, or a committee designated by the chancellor, in respect of the discontinuance of service during the probationary term, or at the expiration thereof, shall have a review of the matter before a committee which shall be designated in accordance with contractual agreements covering employees or by regulations of the chancellor, as appropriate.
>
> After the review, the committee shall forward its advisory recommendation to the community school board or to the chancellor in accordance with contractual agreements."

STATEMENT OF THE CASE

The petitioner Cecil A. Benjamin, an employee of the respondent Board of Education since September 1958, was a teacher of mathematics until his assignment as Acting Principal of Samuel Gompers Vocational High School on May 31, 1972. On August 8, 1974 he was licensed as a regular principal and appointed as a permanent principal on September 12, 1974. On July 24, 1975, with the enactment of Section 2573(1)(b) of the New York Education Law, Benjamin commenced a three-year probationary period as a principal. On July 18, 1978, the respondent Frank J. Macchiarola, newly appointed as Chancellor on July 1, 1978, wrote a letter to Benjamin that he had decided not to grant him tenure and terminated his services as a principal effective three days later, three days before he would have had tenure. In those first seventeen days as Chancellor, Macchiarola claimed to have reviewed the lengthy personnel records of over five hundred supervisory personnel, all of whom, including Benjamin, came up for tenure on July 24, 1978. As reported in the *N.Y. Amsterdam News,* September 23, 1978, page A-4, column 5, under the byline of Joe DeNascimento, 79 supervisors including Benjamin were denied tenure.

Macchiarola said in a formal statement concerning the grant of tenure,

> ". . . It cannot be given without basis or without an indication of genuine contribution; it must, in short be earned."

The quoted language appeared in a news item in *The New York Times* of July 19, 1978, page B-4, column 5 under the byline of Marcia Chambers. The obvious inference from Macchiarola's statement is that Benjamin did not deserve tenure. The resulting

stigma explains Benjamin's inability to obtain private employment, as with the New York Telephone Company, comparable in benefits to that of Principal. In consequence of such termination as a principal, Benjamin reverted to his former position as a teacher of mathematics with a salary loss of approximately $15,000 per annum. *Board of Regents v. Roth,* 408 U.S. 564, 573.

Macchiarola's letter of July 18, 1978, also stated that Benjamin was "entitled to the review of procedures provided under section 5.3.4 of the Bylaws of the Board of Education." Section 5.3.4 applied to employees of the Board of Education who are summoned to appear before the Chancellor or a committee designated by him to appeal an unsatisfactory rating or a recommendation of discontinuance of probationary service. Macchiarola's reference to Section 5.3.4 is inexplicable in the case of Benjamin whose ratings in twenty years of service with the Board of Education had always been satisfactory but who was nevertheless confronted with the established fact of discontinuance of service without a statement of reasons and without the opportunity for review of any recommendation of such discontinuance as provided by Section 5.3.4C of the Bylaws.

After Benjamin instituted proceedings on July 21, 1978 in the Supreme Court of the State of New York by service of a notice of motion and petition for judicial review of his termination as principal, the respondent Board of Education wrote an undated certified letter to the petitioner stating that the Office of Appeals and Reviews was ready to "heat" the matter. The letter gave no reasons for terminating Benjamin who was never charged with incompetence or misconduct. The letter stated:

"THE BOARD OF EDUCATION
OF THE CITY SCHOOL DISTRICT OF
NEW YORK
DIVISION OF PERSONNEL
65 Court Street
Brooklyn, N.Y. 11201

FRANK C. ARRICALE, II
Executive Director

In reply please refer to
596-6570

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Cecil Benjamin
347 Mt. Hope Boulevard
Hastings-on-Hudson, New York 10706

Dear Mr. Benjamin:

We have been informed by the Chancellor that you were not granted tenure.

The Office of Appeals and Reviews is ready to heat this matter beginning August 7, 1978.

Will you please, therefore, contact this office by phone immediately upon receipt of this letter, so that we can finalize arrangements.

Very truly yours,

S. Thomas Ferrigno,
Administrator

STF;pd
Enc."

Benjamin's complaint in the United States District Court sought retroactive reinstatement as a regular principal. That court had jurisdiction under 28 U.S.C. §1331(a) in that the matter in controversy exceeded the value of $10,000 and arose under the Constitution of the United States. That court also had jurisdiction under 28 U.S.C. §1343(3)(4) in that the action was brought under 42 U.S.C. §1983 for redress for denial of equal protection of the laws and for deprivation of liberty or property without due process of law in violation of petitioner's rights under the Fourteenth Amendment. In addition, petitioner sought redress under 42 U.S.C. §1983 for abridgment of his free speech rights.

The respondents moved for judgment on the pleadings or for summary judgment. The petitioner cross-moved for summary judgment. The petitioner by separate affidavits in support of his cross-motion alleged that he was denied tenure in consequence of his constitutionally protected activity in terminating two teachers who had been reverted to probationary service for one year for violation of the Taylor Law's prohibition of strikes. New York Civil Service Law, Section 210(2f). The teachers, Robert Chamberlain and Martin Gregor, had the full support of the union, The United Federation of Teachers. The petitioner, on the other hand, incurred the enmity of active union members on the Gompers High School faculty.

Bertha Gordon, Assistant Superintendent of Schools, evidently referred to the schism separating teachers in support of from those against the union's support of Chamberlain and Gregor when she wrote concerning the petitioner's probationary services:

> "Mr. Benjamin inherited a school in transition. He is an atypical principal in that he had had no prior supervisory or administrative experience.

> Because of this he developed and followed a systematic program for professional growth. He enrolled in CUNY at Plattsburgh, shortly after his appointment, majoring in Vocational Education. Upon completion, he enrolled in Weaver, an auxiliary NYU school sponsored by the State Education Department for Vocational Education. Presently work is being completed on a thesis focusing on Vocational Education at Fordham University under Professor Anthony Baratta. Mr. Benjamin has joined many professional organizations, attends many conferences and subscribes to professional journals.
>
> The major difficulty during this probationary period has been refinement in administrative techniques because of inexperience and perceptions of the role of administrator which is in variance with an entrenched group of teachers who see themselves as the school's advocates in vocational, education and school administration."

In a letter dated August 7, 1978 to his attorney, petitioner reported that Macchiarola's denial of tenure was in response to complaints concerning petitioner's performance by members of the United Federation of Teachers. The United Federation of Teachers, Benjamin wrote, wanted to oust him because he terminated the two Taylor Law probationary teachers.

Daniel Dubitsky, Chapter Chairman of the United Federation of Teachers, and a Union Committee demanded petitioner's removal. In a letter dated May 11, 1978, Samuel Polatnick, Executive Director of the Board of Education,

rejected this demand. Mr. Polatnick determined that a change in school leadership was unjustified in view of progress at Gompers under Benjamin's leadership. A copy of Polatnick's letter follows:

"BOARD OF EDUCATION OF THE CITY OF NEW YORK
110 Livingston Street, Brooklyn, N.Y. 11201
High School Division

Samuel Polatnick
Executive Director

Telephone
596-6102

May 11, 1978

Mr. Daniel Dubitsky
Chapter Chairman, UFT
Samuel Gompers Vocational &
Technical High School
455 Southern Boulevard
Bronx, New York 10455

Dear Mr. Dubitsky:

I am replying here to the issue raised by you and your committee on May 5, 1978 regarding the functioning of Samuel Gompers High School and its leadership. To this end, I have consulted with Superintendent Bertha Gordon, Mr. George Quarles, and pertinent records.

I appreciate and share your commitment to preventing the decline of a school, and in fact making every effort to enhance its services. As I

also pointed out, I am concerned that we develop solutions which will address the real problems.

A review shows that the decline of school registeres and the rise of attendance problems are characteristic of a number of schools in the Bronx. I also note a significant improvement at Gompers in reducing problems of school security and violence.

In the period '73 to fiscal year '79 the following grants enriched shop offerings:

FY 73-74	Business Machine Repair Color TV Equipment	$100,000
FY 76	Electrical Power Technology	84,894
FY 77	Miscellaneous Tools & Supplies	25,000
FY 78	Technical Elect.	56,000
FY 79	Electronics	56,131

In February 1978, new A.P.'s, Supervision joined your staff in Related Technology, Mathematics, and Radio & TV. A new A.P. Guidance has been assigned. This will provide additional supervisory, administrative, and security support.

Data indicates that entrance examinations are given, club activities have expanded, and serious efforts have been made to improve communication with the staff.

I have explored further with Mr. Quarles additional steps which might be taken immediately to make Gompers more attractive to

a broader group of young people. He is ready to take the following steps in the very near future:

1. an examination of all the Gompers' shops in terms of recommendations to initiate appropriate upgrading.

2. consultation with staff in terms of developing a magnet in the interrelated fields of electronics, micro-processing, and mini-computer servicing.

3. exploration of the development of curricular offerings attractive to young women.

4. initiation of a career guidance information system.

I also met with Councilman Gerena-Valentin who indicated that plans for rehabilitation of the South Bronx will include participation by Gompers.

In view of the total picture, I cannot see justification for a change in school leadership. I would urge, particularly in view of the promise inherent in national concern for the rehabilitation of the South Bronx, a fresh, cooperative effort to join experience and wisdom in initiating an effort to upgrade offerings, develop a magnet concept, reach out to emerging community rehabilitation efforts, and to work at the development of student pride in the school.

Cordially,

s/ Samuel Polatnick
SAMUEL POLATNICK
Executive Director

SP:mg
cc: Superintendent Bertha Gordon
Mr. George Quarles
Mr. Cecil Benjamin"

Both Polatnick and Gordon recommended tenure for Benjamin. However, Mr. Dubitsky and the Union Committee eventually succeeded in ousting Benjamin upon the appointment of Macchiarola, the new Chancellor.

Benjamin's role in terminating Chamberlain and Gregor was not confined to a brief notification of discontinuance of their services. On the contrary Benjamin necessarily engaged in extensive expression on the subject over a prolonged period in accordance with the Bylaws of the Board of Education. Such expression continued beyond the procedures of the Board of Education when Gregor named him as a defendant in a proceeding before the Division of Human Rights of the State of New York.

Letters and reports confirm that Benjamin's ouster as principal was in retaliation for the exercise of his First Amendment right of free speech in the Chamberlain and Gregor proceedings.

Benjamin's letter of February 14, 1975 to Gregor, quoted Gregor's threats to "get" him: "If it is the last thing that I do, I'll get you. I'll destroy you . . . . Back in Czechoslovakia a man like you wouldn't be let into a school, let alone be a principal."

Gregor had been rated unsatisfactory five times before coming to Gompers. In a report dated June 21, 1976, recommending discontinuance of Gregor's probationary services, Benjamin gave Gregor unsatisfactory ratings for his professional attitude and for not maintaining good relations with other teachers and supervisors.

Benjamin expressed as reasons for an unsatisfactory rating report on Gregor dated June 26, 1976, "Unsatisfactory professional attitude substantiated by the use of vulgar and abusive language to the principal, assistant principals, etc."

On October 22, 1976, the Division of Human Rights of the State of New York enclosed with a letter to Benjamin a copy of a verified complaint by Gregor alleging that Benjamin and Mrs. Gordon terminated him "because of the provisions in the Taylor Law probationary period for striking teachers." Gregor's complaint also referred to an earlier complaint he had filed with the New York State Division of Human Rights alleging discrimination because of his color (white). (Benjamin and Mrs. Gordon are black.)

In a letter of November 2, 1977 to Gregor, S. Thomas Ferrigno of the Office of Appeals and Reviews of the Board of Education informed him that a report from Mrs. Gordon and Benjamin recommended discontinuance of his probationary service and scheduled a review of the recommendation.

Although respondents' motion for judgment on the pleadings pursuant to Rule 12(c) FRCP should have been treated as one for summary judgment because matters outside the pleadings were presented and not excluded by the court, the motion for judgment on the pleadings was nevertheless granted. In a footnote to his opinion, United States District Court Judge Robert J. Ward referred to Benjamin's allegation by way of

separate affidavit that he was denied tenure in retaliation for his termination of Chamberlain and Gregor. The court rejected Benjamin's contention that his activities in terminating these teachers were constitutionally protected under the First and Fourteenth Amendments. However, Benjamin's proceedings in opposition to Gregor, a Taylor Law probationer, before the respondent Board of Education and the State Division of Human Rights, as well as his proceedings against Chamberlain, also a Taylor Law probationer, and the consequential successful efforts by active union members to induce Macchiarola to terminate Benjamin establish that his ouster was in retaliation for his exercise of constitutionally protected expression. *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274.

REASONS FOR GRANTING THE WRIT

The decision below is in conflict with the doctrine of *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, that a discharge in retaliation for the employee's exercise of his First Amendment rights may entitle him to relief under 42 U.S.C. §1983. In the cited case, Doyle, an untenured teacher, was denied renewal of his contract. A factor in the decision was Doyle's telephone call to a radio station supplying it with the substance of a memorandum related to teacher dress and appearance issued by the school principal. Doyle sought reinstatement with back pay under 42 U.S.C. §1983.

This Court held that Doyle's conduct was constitutionally protected by the First and Fourteenth Amendments. This Court found no bar to such protection from Doyle's lack of tenure, stating at page 283:

> "Doyle's claims under the First and Fourteenth Amendments are not defeated by the

> fact that he did not have tenure. Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, *Board of Regents v. Roth,* 408 U.S. 564 (1972), he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms. *Perry v. Sindermann,* 408 U.S. 593 (1972)."

As this Court further observed at p. 284:

> "That question of whether speech of a government employee is constitutionally protected expression necessarily entails striking 'a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968). There is no suggestion by the Board that Doyle violated any established policy. . . ."

Benjamin's conduct in bringing charges against Chamberlain and Gregor leading to their discharge was constitutionally protected. Also, Benjamin's defense of the proceedings instituted against him by Gregor before the New York State Division of Human Rights was constitutionally protected. At the same time Benjamin in proceeding as he did in the Chamberlain and Gregor matters acted in full accord with Board of Education policies.

CONCLUSION

The respondents' termination of Benjamin for his role in terminating Chamberlain and Gregor violated his First and Fourteenth Amendment rights. The lower courts' determination of the federal question presented conflicts with the decision of this Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274. A writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

WILLIAM GOFFEN
Attorney for Petitioner

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

N.B. Since this statement does not constitute a formal opinion of this Court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York on the eighteenth day of February, One Thousand Nine Hundred and Eighty-One.

Present:

HONORABLE STERRY R. WATERMAN,

HONORABLE WALTER R. MANSFIELD,

HONORABLE AMALYA L. KEARSE,

Circuit Judges.

Dkt. No. 80-9041

Filed Feb. 18, 1981

Appendix A

CECIL A. BENJAMIN,

Plaintiff-Appellant,

-against-

FRANK J. MACCHIAROLA, Individually, and as Chancellor of the Board of Education of the City of New York and the BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants-Appellees.

Cecil A. Benjamin appeals from a judgment of the District Court for the Southern District of New York entered on October 24, 1980, dismissing his complaint under 42 U.S.C. §1983, which sought a declaratory judgment to the effect that his probationary appointment as a public high school Principal was terminated by defendants in violation of his constitutional rights and an order directing the defendants retroactively to reinstate him as a Principal.

Benjamin, a mathematics teacher, obtained a license as a high school Principal in 1974 and on July 24, 1975, began a three-year probationary period as Principal of the Samuel Gompers Vocational High School in the Bronx. On July 18, 1978, prior to the expiration of the probationary period, defendant Macchiarola advised Benjamin in writing that he would not be granted tenure and terminated him as Principal at Samuel Gompers, whence he returned to his position as mathematics teacher. He claims that the district court erred in holding that he was not denied due process and equal protection under the laws by reason of his allegedly being terminated in retaliation for his discharge of two teachers for participating in

an unlawful strike in violation of New York's Taylor Law, N.Y. Civil Service Law, §210, and because the termination stigmatized him by implying that he had not "earned" tenure.

We find no merit in Benjamin's contentions and affirm the judgment of the district court, substantially for the reasons stated by Judge Ward. As a probationary Principal, Benjamin had no tenure, either de facto or de jure, and no property entitlement to that position. See *Board of Regents v. Roth,* 408 U.S. 564 (1972); *Perry v. Sindermann,* 408 U.S. 593 (1972); *Huntley v. Community School Bd.,* 543 F.2d 979 (2d Cir. 1976), *cert. denied,* 430 U.S. 929 (1977). His discretionary exercise of his power as Principal to discharge two employees did not amount to an exercise of free expression under the Constitution. Nor can the termination be viewed, because of defendant Macchiarola's earlier statement that tenure must be "earned," which did not refer to appellant personally, as stigmatizing or as an infringement of his liberty interests. No facts indicating discriminatory treatment of appellant as compared with others similarly situated are alleged. Lastly, it must be noted that Benjamin did not avail himself of the right of review of the procedures followed in terminating him as Principal, which is provided by §5.3.4 of the Board of Education's by-laws. Instead he commenced an Article 78 proceeding in the Supreme Court of the State of New York, seeking judicial review of the defendants' decision to terminate him, alleging that the denial of tenure was arbitrary and capricious. The state court's denial of relief was affirmed by the Appellate Division, Second Department, see 67 A.D.2d 974 (1979).

The judgment of the district court is affirmed.

Appendix A

s/ Sterry R. Waterman
Sterry R. Waterman, U.S.C.J.

s/ Walter R. Mansfield
Walter R. Mansfield, U.S.C.J.

s/ Amalya L. Kearse
Amalya L. Kearse, U.S.C.J.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

79 Civ. 5985(RJW)

CECIL A. BENJAMIN,

Plaintiff,

-against-

FRANK J. MACCHIAROLA, Individually and as Chancellor of the Board of Education of the City of New York, and the BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants.

Plaintiff Cecil A. Benjamin ("Benjamin") brings this action under 42 U.S.C. §1983 ("§1983") alleging that during 1978 he was improperly denied tenure in the position of high school principal. Benjamin seeks reinstatement to that position. Defendants move for judgment on the pleadings under Rule 12(c), Fed. R. Civ. P. Benjamin has cross-moved for summary judgment under Rule 56, Fed.R.Civ.P. For the reasons hereinafter stated, judgment on the pleadings is granted in favor of the defendants and Benjamin's cross-motion for summary judgment is denied.

Benjamin, a mathematics teacher in the New York City public school system, obtained a license as a high school

principal on August 8, 1974. On July 24, 1975, he began a three-year period of probationary service in the principal's position at Samuel Gompers Vocational High School, Bronx, New York. The probationary period was scheduled to expire on July 24, 1978, at which point Benjamin would have become eligible to receive tenure. By a letter dated July 18, 1978, defendant Frank J. Macchiarola, Chancellor of the Board of Education of the City of New York ("the Board of Education"), notified Benjamin that he would not be granted tenure. Benjamin was simultaneously terminated as principal at Samuel Gompers Vocational High School.

Benjamin filed the complaint in the present action on November 27, 1979. The complaint alleges that defendants denied Benjamin due process and the equal protection of the laws in connection with the decision not to grant him tenure. Benjamin asks the Court to vacate the Board of Education's decision denying him tenure and terminating him, and to order Benjamin reinstated as a tenured principal, with retroactive salary, seniority and pension rights. Benjamin's complaint is, however, insufficient to state a claim upon which relief can be granted under §1983 because it fails to allege either deprivation of an entitlement deserving of due process protection or facts sufficient to indicate a denial of equal protection.*

---

* Benjamin has, by way of separate affidavit, alleged that defendants' decision to deny him tenure was in retaliation for his decision to terminate two tenured teachers who worked at his school. Benjamin contends that his activity in terminating these teachers was constitutionally protected under the first and fourteenth amendments, and that the retaliatory discharge of Benjamin thus constituted a deprivation of his first amendment rights which can be remedied under §1983. The Court recognizes that a §1983 claim can be founded on a discharge in retaliation for the employee's exercise of his first amendment rights. *Mount Healthy City School District Board of Education v. Doyle*, 429

(Cont'd)

Appendix B

Due Process Claims

It is fundamental that a successful due process claim under §1983 must be predicated on the deprivation of a constitutionally protected entitlement. Benjamin had no "property" entitlement here. Only teachers who have tenure or "de facto" tenure have a constitutionally protected property interest in their job. *Longarzo v. Anker,* 578 F.2d 469, 471 (2d Cir. 1978). Benjamin concededly did not have formal tenure. Further, since Benjamin was terminated before the expiration of his probationary period, there can be no finding of tenure by estoppel. *See Mathews v. Nyquist,* 67 A.D.2d 790, 791, 412 N.Y.S.2d 501, 502-03 (3d Dept. 1979).

The question of whether Benjamin had "de facto" tenure must be resolved by reference to state law. *Bishop v. Wood,* 426 U.S. 341, 343-47 (1976). Under New York law, it is settled that a school board may deny tenure to a probationary teacher without a hearing and without stating any reasons for its actions. *Bergstein v. Board of Education,* 34 N.Y. 2d 318, 322, 357 N.Y.S.2d 465, 468, 313 N.E.2d 767, 769 (1974). Benjamin's case is not strengthened by the fact that the Board of Education's by-laws do in fact provide for a hearing where a probationary teacher has been denied tenure. It has been held that mere provision of an unrequired hearing does not create an

(Cont'd)

U.S. 274, 283-84 (1977). However, the complaint fails to make any mention of an independent first amendment claim or to allege any facts which would support such a claim. Further, Benjamin's separate affidavit wholly fails to explain, and it is not apparent to the Court, how his activity in discharging the two teachers might be viewed as speech or expression within the first amendment. The mere fact that Benjamin's status as principal empowered him to order such terminations does not necessarily mean that in doing so he was exercising his constitutional rights.

expectation of continued employment sufficient to form the basis of a due process entitlement. *Weiss v. Anker,* 421 F. Supp. 1040, 1043 (E.D.N.Y. 1976); *Haron v. Board of Education,* 411 F. Supp. 68, 71 (E.D.N.Y. 1976); *see Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). Benjamin thus had no constitutionally protected interest in his job.

Nor has Benjamin alleged facts sufficient to support his general allegations that he was deprived of a "liberty" entitlement. It has been held that a "stigmatization" which results from a termination and operates to foreclose a plaintiff from other employment opportunities can state a claim for deprivation of constitutionally protected "liberty." *Board of Regents v. Roth, supra,* 408 U.S. at 573. Benjamin has alleged that employment opportunities have been denied him as a result of his termination. Complaint at 22. However, the "stigmatization" necessary to trigger a deprivation must be founded on something more than the mere fact of termination and its presumed negative effects on employment opportunity. *Board of Regents v. Roth, supra,* 408 U.S. at 575. Benjamin has alleged no additional facts which might support a finding of stigmatization.

Equal Protection Claims

With respect to the equal protection claims, Benjamin's allegations are utterly insufficient to state a claim. Plainly, any such claim under §1983 must allege discrimination and some facts from which discrimination might be found. *See Ellentuck v. Klein,* 570 F.2d 414, 430 (2d Cir. 1978). The complaint makes no allegations whatsoever to this effect. The equal protection claims are thus insufficient even under the liberal pleading standards applied to §1983 actions. *See Powell v. Workmen's Compensation Board,* 327 F.2d 131, 137 (2d Cir. 1964).

Appendix B

Conclusion

Accordingly, defendants' motion for judgment on the pleadings is granted. Benjamin's cross-motion for summary judgment is denied. The complaint is dismissed.

It is so ordered.

Dated: New York, New York
October 17, 1980

s/ Robert J. Ward
U.S.D.J.

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No. 80-1854

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CECIL A. BENJAMIN,

Petitioner,

vs.

FRANK J. MACCHIAROLA, Individually and as Chancellor of the Board of Education of the City of New York, and the BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether the Court of Appeals, in affirming the District Court's granting of respondents' motion to dismiss petitioner's complaint, correctly determined that petitioner's

"discretionary exercise of his power as Principal to discharge two employees did not amount to an exercise of free expression under the Constitution."

STATEMENT OF THE CASE

Petitioner Cecil A. Benjamin is a tenured teacher of mathematics in the public school system of the City of New York (64a)*. On May 31, 1972, petitioner was appointed Acting Principal of Samuel Gompers Vocational High School, Bronx, New York. He served in that capacity until September 12, 1974, when he was appointed principal (64a). Pursuant to Section 2573(1)(b) of the Education Law of New York, enacted July 24, 1975, petitioner began his three-year probationary period as principal as of the date of enactment.

By letter dated July 18, 1978, respondent Chancellor Macchiarola informed petitioner of his decision not to grant him tenure (45a). The letter further advised that petitioner was entitled, under Section

*References are to pages of the Joint Appendix to the Second Circuit Court of Appeals.

5.3.4 of the Board of Education's By-laws, to a review of the procedures relevant to the termination of his probation (45a). On or about July 27, 1978, petitioner was notified, by certified mail, that the §5.3.4 review had been scheduled for August 7, 1978 (30a, 60a). Petitioner did not avail himself of that review (30a, 60a).

Petitioner then commenced an Article 78 proceeding in the Supreme Court of the State of New York, seeking judicial review of the Chancellor's determination and alleging that the denial of tenure was arbitrary and capricious (40a). By order entered September 11, 1978, the relief requested was denied (57a). Benjamin v. Macchiarola, Index No. 14025/78 [Sup. Ct. Kings Co., 1978]). The Appellate Division of the Supreme Court of New York, Second Department, affirmed the lower court's

order (58a) 67 AD 2d 974 (1979). In its decision, the Appellate Division held that petitioner had not exhausted his administrative remedies under the Board's by-laws and the petitioner's collective bargaining agreement. "Furthermore, he has raised allegations unsupported in the record" (58a). Those allegations included that petitioner was denied tenure in retaliation for his dismissal of two Taylor Law probationary teachers while principal of Samuel Gompers Vocational High School. Petitioner's motion for leave to appeal to the New York Court of Appeals was denied on June 5, 1979. 47 NY 2d 708.

Petitioner thereafter commenced the instant action in the District Court for the Southern District of New York. On respondents' motion for judgment on the pleadings, the District Court (WARD, D.J.) found that

petitioner had not been denied his due process rights either of property or liberty, first, because he had achieved neither formal tenure nor de facto tenure based on legitimate expectation of continued employment (92a-93a), and, second, because he suffered no stigmatization based simply on his failure to be accorded tenure. The District Court further found that the complaint made no allegations whatever which would support petitioner's claim of a denial of equal protection.

The question presented to this Court was raised by petitioner, not in his complaint, but in his and his attorney's affidavits in support of his cross-motion for summary judgment (2a-7a, 71a, 75a). The District Court noted that although a "§1983 claim can be founded on a discharge in retaliation for the employee's exercise of his first amendment rights, ... the

complaint fails to make any mention of an independent first amendment claim or to allege any facts which would support such a claim" (95a). Judge Ward further stated that it was not apparent how petitioner's activity in discharging the two teachers might be viewed as speech or expression within the first amendment (95a). The District Court granted respondents' motion for judgment on the pleadings.

The United States Court of Appeals for the Second Circuit affirmed the judgment dismissing the complaint concluding that "[a]s a probationary Principal, Benjamin had no tenure, either de facto or de jure, and no property entitlement to that position .... Nor can the termination be viewed, because of defendant Macchiarola's earlier statement that tenure must be 'earned', which did not refer to appellant personally, as stigmatizing or as an infringement of his liberty

interests" (Petition, Appendix A, p. 3a). The Circuit Court of Appeals also noted that petitioner had failed to pursue his administrative remedies.

With respect to petitioner's First Amendment claim, now the only question before this Court, the Court of Appeals stated (Petition, Appendix A, p. 3a).

> [Petitioner's] discretionary exercise of his power as Principal to discharge two employees did not amount to an exercise of free expression under the Constitution.

REASONS FOR DENYING A WRIT OF CERTIORARI

THE COURT OF APPEALS PROPERLY HELD THAT PETITIONER'S DISCRETIONARY EXERCISE OF HIS POWER AS PRINCIPAL TO DISCHARGE TWO EMPLOYEES DID NOT AMOUNT TO AN EXERCISE OF FREE EXPRESSION UNDER THE CONSTITUTION.

The determination of the Second Circuit Court of Appeals is consistent with this Court's decision in Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) in that the Circuit Court correctly concluded tnat petitioner failed to meet his initial burden of establishing that his conduct was constitutionally protected.

In Mount Healthy City School District Board of Education v. Doyle, id. at 287, this Court stated that a non-tenured teacher cnallenging his dismissal as violative of his First Amendment rights had the initial

burden of showing "that his conduct was constitutionally protected, and that his conduct was a 'substantial factor' in the Board's decision not to rehire him." Petitioner has failed to establish how his conduct in discretionarily dismissing two teachers, in the performance of his duties as Principal, falls within the parameter of the First Amendment.

Although certain types of conduct had been held to constitute "speech" within the meaning of the First Amendment (see, e.g., Spence v. Washington, 418 U.S. 405 (1974) (displaying an American flag with a peace symbol thereon); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) (wearing of black armbands to protest the war in Vietnam); Stromberg v. California 283 U.S. 359 (1931) (displaying a red flag as a symbol of opposition to organized government)), the conduct

alleged by petitioner to be protected by the First Amendment in no way communicates ideas or serves the purposes of self-expression, as did the conduct in the above-cited cases. Petitioner was merely doing his job as principal; his right to act was derived from his position as principal, lawfully conferred upon him by respondents, and not from the constitution.

Additionally, there is no evidence in the record, aside from petitioner's unsupported conclusory allegations in his cross-motion for summary judgment, to support petitioner's assertion that the dismissal of the two teachers influenced respondent Macchiarola's decision to deny him tenure.*

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*Petitioner's letter to his attorney, dated August 7, 1978 (Petition, p. 9; 83a-86a) is hardly conclusive evidence of this allegation as petitioner has argued (Petition, pp. 9, 13).

Consequently, the Court of Appeals properly determined that petitioner failed to establish that his conduct was protected by the First Amendment.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

May 15, 1981

Respectfully submitted,

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CAROLYN E. DEMAREST,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Benjamin was never served with reasons for his discontinuance as principal. Like the protagonist in Franz Kafka's *The Trial,* he was never officially notified of the reasons for the adverse action against him. He contends, however, that his role in seeking the termination of Chamberlain and Gregor for incompetence and misconduct (not for participating in an unlawful strike as assumed by the Second Circuit Court of

Appeals) was the reason for his own dismissal. Benjamin's opposition to Gregor's complaint to the New York State Division of Human Rights accusing Benjamin of discrimination against him because of color and because of provisions of the Taylor Law pertaining to teachers who strike, played a substantial role in Benjamin's retaliatory termination as principal. The retaliatory dismissal of Benjamin for his activities before the Division of Human Rights was for constitutionally-protected conduct in the exercise of his First Amendment right of freedom of speech. *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 281. However, Chamberlain and Gregor had the full support of active members of the United Federation of Teachers who were determined to oust Benjamin.

Respondents mistakenly assert they offered Benjamin an opportunity for administrative review prior to his commencement of proceedings for judicial review on July 25, 1978. Their undated letter asserting readiness to "heat" the matter was mailed to Benjamin two days later on July 27, 1978.

Respectfully submitted,

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